

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

-----X	
In the Matter of the Petition of:	:
	:
DISTRICT COUNCIL 37, AFSCME, AFL-CIO,	:
	:
Petitioner,	:
	:
To Review Under Section 101 of the Labor Law:	:
The Grant of a Petition for Modification of	:
Abatement Date issued January 13, 2010,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
- against -	:
	:
NEW YORK CITY FIRE DEPARTMENT	:
	:
Respondents.	:
-----X	

DOCKET NO. PES 10-001

RESOLUTION OF DECISION

APPEARANCES

Steven Sykes, Esq., Assistant General Counsel to AFSCME District Counsel 37, for  
Petitioner.

Maria L. Colavito, Counsel to NYS Department of Labor, Benjamin A. Shaw of Counsel,  
for Respondent Commissioner of Labor.

City of New York Fire Department Bureau of Legal Affairs, Elena Ferrera, Deputy Counsel,  
for Respondent New York City Fire Department.

WHEREAS:

PROCEDURAL BACKGROUND

On March 24, 2009, the Department of Labor (DOL) conducted an investigation of the New York City Fire Department (FDNY) in response to a complaint that its Emergency Medical Services (EMS) employees were being forced to purchase corrective lenses out of their own funds for use in Millenium Model Air Purified Respirators (APR). On September 28, 2009, DOL issued a Notice of Violation and Order to Comply finding that the FDNY was in violation of 12 CFR 1910.134(d)(1)(i) for failing to provide all employees with the appropriate respirator gear and giving it until December 30, 2009 to abate the violation.

On December 30, 2009, pursuant to 12 NYCRR 804.1 *et seq.*, FDNY filed a Petition for Modification of Abatement Date (PMA) with DOL requesting that the abatement date be moved to March 5, 2010. The Petition alleged that FDNY was “aggressively exploring all avenues to have this violation abated.” FDNY further explained the efforts it had taken to come into compliance and submitted a draft policy but stated that it needed more time.

“Due to the size of the Fire Department and the number of managers and employees involved in this project, it has become very difficult to have all the components of this project in place and completed by the abatement date of December 30, 2009. It is expected that the vendor specification will be finalized by mid-January 2010. The next step will be for the vendor to begin preparing the lenses, inserting them into the appropriate spectacle kits and forwarding the completed spectacle kits back to the Department for distribution to the members. We anticipate that this will take several weeks. **Based on the above, we are requesting an extension of the abatement date from December 30, 2009 to March 5, 2010.**”  
[Emphasis in the original.]

By letter dated January 4, 2010, District Council 37 (DC37), the certified bargaining representative of the EMS employees objected to the extension of the abatement date, pursuant to 12 NYCRR 804.5, based on assertions that the FDNY had sufficient time to come into compliance since the violations had been identified in March 2009, and, in any event, should have made further progress than FDNY indicated that it made. DC 37 also contended that although FDNY indicated that it would not assign EMS personnel who needed corrective lenses to situations which would require the use of respirators, it is impossible to know in advance of a situation whether the use of a respirator will be required.

By letter dated January 13, 2010, DOL granted the PMA and set a new abatement date of March 5, 2010. In accordance with 12 NYCRR 804.7, by letter dated January 22, 2010, DOL filed for the Board’ review a copy of the Notice of Violation, Order to Comply, the PMA, DOL’s letter granting the PMA and DC 37’s letter objecting to the PMA. On January 28, 2010, the Board notified the parties that it was docketing the case and gave the parties until February 9, 2010 in which to serve a Response. DOL, FDNY and DC 37 all filed Responses with the Board. At a telephonic case management conference on February 22, 2010, the parties agreed to have the Board determine whether DOL’s decision to grant the PMA and extend the abatement date to March 5, 2010 was unreasonable and invalid based exclusively on the Responses and without need for an evidentiary hearing.

By letter dated March 3, 2010, the parties were notified by the Board Chairman that she would be recommending that the Board deny the Petition at its next Board meeting on March 24, 2010.

#### STANDARD OF REVIEW

DC 37, as the party challenging the decision of the Commissioner of Labor granting the PMA, has the burden to show that it is invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30).

## THE RESPONSES

DC 37 alleges that the Commissioner's decision is improper for the following reasons: (1) FDNY is not doing everything possible to come into compliance, for example, it could be reimbursing the EMS workers for out of pocket expenses for the purchase of corrective lenses; (2) FDNY has indicated that it will not assign personnel who require corrective lenses to jobs requiring the equipment but it is impossible to know beforehand when the respirator's use will be required and FDNY has not issued any written directives regarding this policy; (3) the draft policy does not abate the violation because it requires members to submit a prescription that is less than 1 year old and the examination to obtain a lens prescription must take place on the employee's own time; and (4) the draft policy includes terms and conditions of employment that must be negotiated with the union. Based on these assertions DC 37 urges that FDNY's violation is ongoing.

FDNY responded to the objection to its PMA and alleges that its procedures and forms are essentially final but because they have been broadened to include other employees of FDNY and other types of protective masks, the task has proven more complicated. During the Board's case management conference, FDNY represented that it expects to have everything in place by the new abatement date of March 5, 2010, or a day or two after. Although DC 37 claims that the spectacle insert kits with the corrective lenses have been needed since 2003 when the MSA Millenium APR was first issued, as of the date of the Response "no member of the EMS service has been called upon to use it." FDNY has further offered to reimburse any EMS member who has purchased, out of his/her own funds, corrective lenses for the spectacle insert kits for the MSA Millenium APR if the purchase was made up between issuance of the MSA Millenium APR in 2003 and February 9, 2010. It also alleges that the collective bargaining issues are not within the jurisdiction of PESH or the Board.

DOL's Response maintains that the Commissioner's decision to grant the PMA was not unreasonable and/or invalid based on the information in the PMA: "Given the time frame for completion of the abatement, the logistics involved in implementing procedures and the progress already made, the Commissioner of Labor granted the Petition."

## CONCLUSION

In light of FDNY's representations that abatement of the violation will occur on or about March 5, 2010, that the process is complicated given the number of departments that must approve the new policy and that it has been working diligently to create a policy and get a vendor in order to abate the violation, the Commissioner's decision to grant the PMA and modify the abatement date by 60 days was not unreasonable or invalid. That FDNY's will reimburse any EMS member who has paid before February 10, 2010, for corrective lenses for to be used with the Millenium Model APR and that the Respirators have not actually been used since their issuance in 2003 provide further support that the decision to extend the abatement date for 60 days was not unreasonable or invalid.

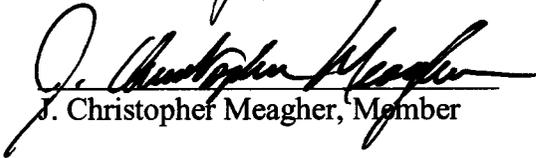
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Decision to grant the Petition to Modify the Abatement Date to March 5, 2010 is hereby affirmed; and
2. The Petition for Review be, and the same hereby is, denied.



---

Anne P. Stevason, Chairman



---

J. Christopher Meagher, Member

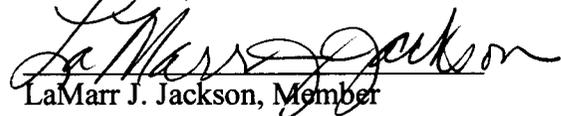
---

Mark G. Pearce, Member



---

Jean Grumet, Member



---

LaMarr J. Jackson, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at New York, New York, on  
March 24, 2010.